

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Enron Power Marketing, Inc. and Enron Energy Services, Inc.	Docket Nos. EL03-180-000
Enron Power Marketing, Inc. and Enron Energy Services, Inc.	EL03-154-000
Portland General Electric Company	EL02-114-007
Enron Power Marketing, Inc.	EL02-115-008
El Paso Electric Company Enron Power Marketing, Inc. Enron Capital and Trade Resource Corp.	EL02-113-000

ORDER ON CERTIFIED QUESTION AND ESTABLISHING HEARING
PROCEDURES

(Issued April 11, 2007)

1. On March 13, 2007, the presiding Administrative Law Judge (ALJ) in the captioned proceedings, Carmen A. Cintron, certified the following question to the Commission pursuant to Rule 714 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.714 (2006):¹

¹ See March 13, 2007 Certification of Question Regarding Suspension of Witness and Attorneys Pursuant to Rule 2102, Docket No. EL03-180-000, *et al.* (Certification Order).

Whether a hearing should be initiated to determine if Dr. Jan Paul Acton (Dr. Acton), Charles River Associates (CRA), and Enron's attorneys should be suspended from appearing and practicing before the Commission?

Judge Cintron requests that the Commission determine whether a hearing should be initiated so that any potential decision as to suspension or disqualification of persons appearing before the Commission comports with Rule 2102 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2102(a) (2006). Rule 2102 states that "[a]fter a hearing the Commission may disqualify and deny, temporarily or permanently, the privilege of appearing or practicing before it in any way a person who is found . . . [t]o have engaged in unethical or improper conduct."²

2. For the reasons discussed below, the Commission finds that a hearing should be conducted to determine whether Dr. Acton, CRA, or the Enron attorneys (the Enron Parties) have engaged in unethical or improper conduct. The Commission refers the matter to the Chief Judge for him to designate a presiding judge to conduct a hearing in accordance with the guidelines set out below.

Background

3. In 2001, Judge Cintron presided over litigation surrounding transactions in the Pacific Northwest spot market.³ That proceeding addressed whether there may have been unjust and unreasonable charges for spot market bilateral sales in the Pacific Northwest and the extent of potential refunds.⁴ In August 2001, Judge Cintron issued orders requesting transaction data, and directed parties to submit data on their transactions in the Pacific Northwest to the Commission using a specific template.⁵ Dr. Acton assisted

² In this proceeding, the Commission will limit its interpretation of "person," for the purposes of Rule 2102, to apply to individuals and not broader organizations such as law firms or consulting firms, unless facts arising at hearing indicate broader organizational involvement.

³ *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy*, Docket No. EL01-10-000.

⁴ *San Diego Gas & Electric Co.*, 96 FERC ¶ 61,120, at 61,520 (2001).

⁵ See Order on Data Submissions, August 3, 2001, Docket No. EL01-10-000 and Order on Format for Data Submissions, August 9, 2001, Docket No. EL01-10-000 (2001 Data Orders). In pertinent part, the August 3, 2001 data order states that "[t]he record should establish the volume of transactions, the identification of net sellers and net

counsel for Enron Power Marketing, Inc. and Enron Energy Services, Inc. (collectively, Enron) in preparing Enron's response to the 2001 Data Orders.

4. In 2007, Dr. Acton testified in the above-captioned proceeding, Docket No. EL03-180-000, *et al.*, over which Judge Cintron has also been presiding. As set forth in the Joint Statement of Issues filed by counsel for Enron and Public Utility District No. 1 of Snohomish County, Washington (Snohomish) on January 23, 2007, the issues being determined include: (1) whether Enron violated its market-based rate authority from January 16, 1997 to June 23, 2003; (2) whether Enron engaged in gaming or anomalous market behavior during that period; and (3) what are appropriate remedies, if any.⁶ Under cross-examination by Snohomish's counsel, Dr. Acton provided testimony that calls into question the completeness of the data submitted to the Commission in the 2001 Pacific Northwest proceeding. Judge Cintron's Certification Order, with a certified record attached (including a partial transcript of Dr. Acton's testimony, exhibits referenced in that testimony, and the August 3, 2001 data order), contains the pertinent facts the Commission considered in deciding how to act on the certified question.

5. The certified record reveals that Dr. Acton, in assisting Enron counsel, did not release certain data regarding transactions internal to Enron.⁷ Dr. Acton testified that the excluded data reflected internal Enron bookkeeping activities and was removed for the purpose of "fairly and accurately" representing Enron's trading with the outside world.⁸ Dr. Acton explained that these internal "bookkeeping" transfers were not from one Enron

buyers, the price and terms and conditions of the sales contracts, and the extent of potential refunds," and that "[a] future order [(i.e., the August 9, 2001 data order)] will identify specific items to be included in the data submissions."

⁶ Dr. Acton appeared as a witness on behalf of Enron in this current proceeding.

⁷ See, e.g., Ex. SNO-1117, Email from Dr. Acton to Guillermo Petrei, David Riker, and gfergus@brobeck.com (August 15, 2001 at 7:25 PM) stating in part, "Guillermo—also note that I will be correcting the counterparty table sent earlier. Gary wants to drop a series of trades (and counterparty descriptions) for a set of counterparties internal to Enron, used for bookkeeping purposes (names like selling to Enron ...);" see also Ex. SNO-1118, Email from Dr. Acton to Guillermo Petrei, David Riker, and gfergus@brobeck.com (August 15, 2001 at 7:33 PM) stating in part, "There is a new column: Exclude. Use it to eliminate trades with these counterparties in all our reporting. These are internal trades in Enron for bookkeeping purposes."

⁸ Tr. at 3440.

affiliate to another Enron affiliate; rather, they were transfers of responsibility for transactions (from one trade desk to another) within the same Enron affiliate.⁹

6. Judge Cintron recommends in the Certification Order that the certified question be answered affirmatively. The order states that action by the Commission to enforce its rules and procedures by initiating a hearing will “send a signal to parties and others that the Commission will not allow lack of candor, misrepresentations or willful misconduct in its proceedings.”¹⁰

Responses to Certification Order

7. On March 19, 2007, Enron and CRA International Inc. (CRA) filed responses to the Certification Order. Enron’s response states that, in light of the failure of the Certification Order to conform to the requirements of Rule 714, the Commission should remand the certified question to the presiding judge for further proceedings to create a clear and complete record. CRA filed an emergency motion to vacate the certified question, requesting expedited consideration and that the Commission remand the question to the presiding judge to conduct proceedings that comport with Rules 714 and 2102.

Enron Response

8. Enron states that the Certification Order fails to conform to the requirements of Rule 714 because respondents were not afforded an opportunity to provide their views on the certified question. Enron alleges a variety of procedural deficiencies in the Certification Order. Enron posits that Judge Cintron did not observe certain of Rule 714’s clear requirements for certification of questions to the Commission, including the requirements of Rule 714(c) that the presiding officer: (1) “solicit, to the extent practicable, the oral and written views of the participants;” (2) “prepare a memorandum which discusses all the views of participants;” and (3) “append . . . the written views submitted by the participants, [and] the transcript pages containing oral views”

9. Enron also argues that Rule 2102 requires the Commission to identify the “person” that is subject to the proceeding, and the Certification Order does not identify with specificity the respondents subject to the certification question.¹¹ Enron states that the

⁹ *Id.* at 3438-40.

¹⁰ Certification Order at P 10.

¹¹ For example, the Certification Order only identifies “Enron’s attorneys.”

Certification Order is “all the more problematic” because the one person it specifically mentions, Dr. Acton, was not even a witness in the 2001 Pacific Northwest proceeding, but rather served as a non-testifying economic consultant. Enron names the law firms that assisted and appeared on behalf of Enron in the Pacific Northwest proceeding,¹² and states that no attorneys from LaBoeuf, Lamb, Greene & MacRae LLP, Enron’s main counsel in the current proceeding, were involved in the assembly or submission of Enron’s response to the Pacific Northwest proceeding data request. Enron concludes that the Certification Order is inadequate to initiate a Rule 2102 proceeding because the identity of respondents to such a proceeding cannot be determined from the Certification Order.

10. Enron also avers that Judge Cintron’s August 9, 2001 data order clearly contemplated that responding parties were required to file data, not original documents, and that responding parties would assemble the requested data from their internal databases or other information sources, filtering out non-responsive data and collecting it into the required format for submission.¹³ Because the data order did not require original documents to be submitted to the Commission, Enron states that Dr. Acton could not have “filed documents with this Commission . . . [altered] to eliminate relevant information” as the Certification Order charges.¹⁴ Enron also notes that the Certification Order offers no comparison between the data provided by Enron and the data request and template form prescribed by the August 9, 2001 data order.

11. Finally, Enron states that given the changes in its structure and personnel since the 2001 Pacific Northwest proceeding, it does not yet have sufficient information to form a belief with respect to the completeness of the material submitted to the Commission in 2001. Enron states that, if there was an error or the data were developed inaccurately, then the facts and circumstances surrounding the data submission should be developed to the fullest extent possible and placed into the record so that any evaluation of the submission and of the actions of Enron, their counsel, and their consultants, will be accurate. Enron states that the accusations in the Certification Order are serious and due process requires that the record be clear and complete. Therefore, Enron requests that the Commission remand the certified question to the presiding ALJ for hearings so that the

¹² See Enron March 19, 2007 Response at 2-3.

¹³ Enron explains that the August 9, 2001 data order did not direct the parties to produce existing documents, but rather directed that the parties submit data using a specific template described in the order.

¹⁴ Enron Response at 4, quoting Certification Order at P 8.

record will conform to the truth and the presiding ALJ may consider whether certification of a precise question is warranted.

CRA Emergency Motion to Vacate

12. CRA states that Judge Cintron's recommended suspension of Dr. Acton, CRA and unnamed Enron attorneys from appearing before the Commission is an extreme remedy and was made without affording any of the affected parties notice of her intent to seek certification of the suspension question or the opportunity to be heard as mandated by Rule 714.¹⁵ CRA cites the requirements of Rule 714(c)(1) and (2)¹⁶ and argues that Judge Cintron failed to comply with them.

13. Moreover, CRA states that the Certification Order seeks suspension of numerous CRA employees, including those who had no involvement with the events in question, and that Rule 2102 does not permit this form of collective punishment. CRA sees no findings in the Certification Order that would justify sanctions against an entire company, and notes that Dr. Acton's status as a CRA vice-president seems to represent the sole basis for the recommendation of sanctions against CRA in its entirety. CRA avers that even if Dr. Acton's actions have been properly characterized (which it does not believe is the case), Rule 2102 does not contain "language authorizing suspension based on a guilt by association theory." Thus, CRA asserts that there is no justification for punishing CRA and other CRA employees who practice before the Commission.¹⁷

14. CRA requests that the Commission take immediate action because of the potential for irreparable harm created by the Certification Order, as members of CRA are facing an unwarranted "blot" on their reputations. CRA states that Judge Cintron has issued what the industry and press have perceived to be a "black mark" against CRA, which is staining the reputations of CRA and its employees, regardless of their roles in the matter.¹⁸ Further, CRA avers that the Certification Order creates the risk of harm to CRA as a corporate enterprise. In conclusion, CRA requests that the Certification Order be

¹⁵ We note that CRA had misread Judge Cintron's order. CRA argues that Judge Cintron "recommended that the Commission suspend" the Enron Parties. CRA Motion at 1. This is not accurate. We read the Certification Order merely to recommend that a *hearing* be held on *whether* suspension may be appropriate.

¹⁶ *See supra* P 8.

¹⁷ CRA March 19, 2007 Motion at 4.

¹⁸ *Id.*

vacated and remanded to Judge Cintron for further proceedings and that in those proceedings Judge Cintron should: (1) allow further testimony regarding the circumstances of the August 2001 production; and (2) compare the raw data, the actual production by Enron, and the orders issued by Judge Cintron and the Commission.

Discussion

15. The Commission finds that a hearing is appropriate in this matter. The allegation that persons may have withheld materially significant data on Enron transactions in contravention of the 2001 Data Orders is a serious charge that warrants further consideration. We cannot, however, determine on the existing record whether any violation of our rules occurred and we therefore order that further proceedings be held pursuant to the guidelines set forth below.

16. Because our preliminary analysis indicates that there are issues of material fact that cannot be resolved based on the record before us, the Commission finds that these issues are more appropriately resolved through hearing procedures. Accordingly, the Commission refers to the Chief Judge the matter of whether, pursuant to Rule 2102, the Enron Parties engaged in unethical or improper conduct sufficient to warrant disqualification.¹⁹

17. We are cognizant of Enron's and CRA's concerns about procedural deficiencies in the manner in which the Certification Order was presented to the Commission. However, the Certification Order only recommends that the Commission order a hearing, not that the Commission take any final action with regard to suspension. The hearing we are ordering will give Enron and CRA a full and fair opportunity to defend against any claim of improper conduct. We also emphasize that nothing in this order suggests that any individual has violated any Commission rule; we are simply ordering a hearing to ensure that a proper record is developed on these important questions.

18. When considering whether a person has engaged in unethical or improper conduct sufficient to warrant suspension or disqualification pursuant to Rule 2102, the Commission has discretion in determining what conduct falls under the purview of this

¹⁹ The Commission typically refers disputes relating to disqualification of counsel to an ALJ given the fact-intensive nature of such proceedings. *San Diego Gas & Electric*, 63 FERC ¶ 61,274 (1993); *Niagara Mohawk Power Corp.*, 21 FERC ¶ 61,082 (1982).

regulation.²⁰ Rule 2102 states that “[a]fter a hearing the Commission may disqualify . . . a person who is found . . . [t]o have engaged in unethical or improper conduct,” without elaborating on the definition of either “unethical” or “improper.” However, Rule 2101(c) makes clear that “[a] person appearing before the Commission or the presiding officer must conform to the standards of ethical conduct required of practitioners before the Courts of the United States . . .”²¹

19. To ensure that any persons accused of improper conduct shall receive due process of law and that a full and complete record is developed on these matters, we provide the following guidance to the designated presiding judge. The purpose of the hearing shall be to determine whether any person engaged in unethical conduct in violation of Rule 2101, engaged in unethical or improper professional conduct in violation of Rule 2102, or otherwise violated any Commission order or regulation in submitting, or failing to submit, information in response to the 2001 Data Orders. We expect Trial Staff will participate at hearing to ensure an adequate record. In addition, parties to the hearing shall be able to file briefs on and opposing exceptions to the presiding judge’s determinations. The designated presiding judge shall consider the questions set forth

²⁰ A court is obliged to give considerable deference to the Commission’s interpretation of its own regulations and accord it controlling weight unless its interpretation is plainly erroneous or inconsistent with the regulation at issue. *Exxon Corp. v. FERC*, 114 F.3d 1252 (D.C. Cir. 1997) *citing TransCanada Pipelines Ltd. v. FERC*, 878 F.2d 401, 411 (D.C. Cir. 1989); *see also LaClede Gas Co. v. FERC*, 997 F.2d 936, 943 (D.C. Cir. 1993) (finding that an agency’s construction of its own regulations is entitled to substantial deference).

²¹ The Commission has previously established that ABA Model Rules, the ABA’s previous Model Code of Professional Responsibility, or the bar requirements of other jurisdictions are the ethical standards governing conduct of counsel pursuant to 2102. *See, e.g., Delmarva Power & Light Co.*, 24 FERC ¶ 61,380, at 61,798 (1983); *Tenngasco Gas Supply Co. v. Southland Royalty Co.*, 36 FERC ¶61,157, at 61,394 (1986), *citing U.S. Football League v. Nat’l Football League*, 605 F. Supp 1448 (S.D.N.Y. 1985); *see also Woodstone Lakes Dev., L.L.C., et al. v. S. Energy NY-Gen, L.L.C.*, 95 FERC ¶ 61,152, at 61,499 (2001) (stating “[w]hile the Commission is not bound to the D.C. Rules per se, we do look to these rules, as well as the [b]ar requirements of other jurisdictions, to determine whether a practitioner’s behavior complies with Rule 2101(c)”). The language of Rules 2101 and 2102 indicates that any *person* appearing before the Commission, not just attorneys, must conform his or her conduct to the ABA Model Rules or the bar requirements of other jurisdictions.

below in conducting this hearing and making a recommendation to the Commission in an initial decision:²²

(1) The presiding judge shall provide any person alleged to have engaged in such conduct due process of law, including notice and the right to appear and defend against such allegations through the submission of testimony, oral argument and briefs of counsel, or such other procedures as the presiding judge deems appropriate under the circumstances. If a dispute arises with respect to the procedures to be applied, and there is no controlling Commission precedent, the presiding judge should adopt the procedures applicable in the federal courts of the United States as to matters of a similar nature.

(2) In making a determination as to whether any person engaged in unethical conduct in violation of Rule 2101, engaged in unethical or improper professional conduct in violation of Rule 2102, or otherwise violated any Commission order or regulation in submitting, or failing to submit, information in response to the 2001 Data Orders, the presiding judge shall determine whether the 2001 Data Orders were clear and unambiguous with respect to the submission of the data in dispute or, alternatively, whether more than one interpretation of the orders could have been reasonable under the circumstances. The presiding judge shall also determine whether the data in dispute submitted to the Commission in the Pacific Northwest proceeding complied with the 2001 Data Orders.

(3) In making a determination as to whether Rules 2101 and 2102 were violated by a failure to conform to ethical standards, the presiding judge shall consider the ethical standards set forth in ABA Model Rules 3.3, Candor toward the Tribunal, and 3.4, Fairness to Opposing Party and Counsel, including whether any person violated such standards by:

- a. knowingly making a false statement of fact or law to a tribunal;
- b. knowingly failing to correct a false statement of material fact previously made to the tribunal;
- c. knowingly offering false evidence to the Commission;
- d. unlawfully obstructing another party's access to evidence;
- e. unlawfully altering, destroying or concealing a document or other material having potential evidentiary value;

²² The designated presiding judge is authorized to enter orders, as appropriate, to protect confidential information that arises at hearing.

- f. counseling or assisting another person to unlawfully obstruct another party's access to evidence;
- g. counseling or assisting another person to unlawfully alter, destroy or conceal a document or other material having potential evidentiary value.

(4) If the presiding judge finds that a person has violated a Commission rule, regulation or order in respect of the foregoing, the presiding judge shall consider:

- a. To what extent was there any actual or potential injury or harm caused by the misconduct?
- b. Are there any aggravating or mitigating circumstances the Commission should consider?
- c. Are there any other pertinent factual considerations, beyond what has been addressed here, that need explication?

(5) If the presiding judge finds that a person has violated a Commission rule, regulation or order in respect of the foregoing, the presiding judge shall identify, with specificity, the person(s) that committed the violation, set forth the factual and legal basis for concluding that such violation occurred, and determine whether a remedy is appropriate under the circumstances. If the presiding judge also finds that a business, partnership or corporation should be held responsible for any such violation, the presiding judge shall set forth, with specificity, the factual and legal basis for holding any such business, partnership or corporation responsible for such violation and determine whether a remedy is appropriate under the circumstances.

(6) If the presiding judge finds that no violations have occurred, or that no action by the Commission is necessary, the presiding judge shall make such recommendation.

The Commission orders:

(A) Pursuant to Rules 2101 and 2102 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2101 and 2102 (2006), the issues identified above are referred to the Chief Administrative Law Judge Curtis L. Wagner for further action in accordance with the procedures set forth in this order.

(B) A presiding judge, to be designated by the Chief Administrative Law Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a conference in these proceedings in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, DC 20426. Such conference shall be

held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates, and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Philis J. Posey,
Acting Secretary.